

1  
2  
3  
4  
5 **UNITED STATES DISTRICT COURT**  
6 **DISTRICT OF NEVADA**  
7

8 **BOYD GAMING CORPORATION,**

9 **Plaintiff,**

10 **v.**

11 **KING ZULU, LLC,**

12 **Defendant.**  
13  
14

2:12-CV-16 JCM (CWH)

15 **ORDER**

16 Presently before the court is plaintiff Boyd Gaming Corporation's motion for default judgment  
17 against defendant King Zulu, LLC. (Doc. # 21). Plaintiff's also request the court to release bond.  
18 (Doc. # 22).

19 **I. Background**

20 On January 5, 2012, plaintiff filed a complaint in this court alleging violations for (1)  
21 cybersquatting under 15 U.S.C. § 1125(d), (2) trademark infringement under 15 U.S.C. § 1114, (3)  
22 unfair competition under 15 U.S.C. § 1125(a), (4) trademark dilution under 15 U.S.C. § 1125(c), (5)  
23 common law trademark infringement, and (6) common law intentional interference with prospective  
24 economic advantage. (Doc. # 1). On January 20, 2012, the court granted plaintiff's motion for a  
25 temporary restraining order. (Doc. # 9). On January 23, 2012, plaintiff posted a \$100 bond. (Docs.  
26 # 10 and 14). On February 3, 2012, the court granted plaintiff a preliminary injunction. (Docs. # 15  
27 and 16).  
28

1 Defendant was timely served (doc. # 18); however, defendant has failed to answer or  
 2 otherwise respond to plaintiff's complaint despite being on notice of plaintiff's claims against it  
 3 (doc. # 6:21-22; *see* docket generally). On March 23, 2012, plaintiff filed a motion for entry of  
 4 default against defendant. (Doc. # 19). On March 26, 2012, the clerk's office entered default as to  
 5 defendant. (Doc. # 20).

## 6 **II. Discussion**

7 Pursuant to Federal Rule of Civil Procedure 55(a), "[w]hen a party against whom a judgment  
 8 for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by  
 9 affidavit or otherwise, the clerk must enter the party's default." FED. R. CIV. P. 55(a). Federal Rule  
 10 of Civil Procedure 55(b)(2) provides that "a court may enter a default judgment after the party  
 11 seeking default applies to the clerk of the court as required by subsection (a) of this rule." FED. R.  
 12 CIV. P. 55(b)(2).

13 On March 26, 2012, the clerk entered default against defendant for its failure to plead or  
 14 otherwise defend the instant lawsuit. (Doc. # 20). Pursuant to Federal Rule of Civil Procedure  
 15 55(b)(2), plaintiff now asks this court to enter default against defendant.

### 16 **A. Default Judgement**

17 The choice whether to enter a default judgment lies within the discretion of the trial court.  
 18 *Aldabe v. Aldabe*, 616 F.3d 1089, 1092 (9th Cir. 1980). In the determination of whether to grant a  
 19 default judgment, the trial court should consider the seven factors articulated in *Eitel v. McCool*, 782  
 20 F.2d 1470, 1471-72 (9th Cir. 1986). These factors are: (1) the possibility of prejudice to plaintiff, (2)  
 21 the merits of the claims, (3) the sufficiency of the complaint, (4) the amount of money at stake, (5)  
 22 the possibility of a dispute concerning material facts, (6) whether default was due to excusable  
 23 neglect, and (7) the policy favoring a decision on the merits. *Id.* In applying these *Eitel* factors, "the  
 24 factual allegations of the complaint, except those relating to the amount of damages, will be taken  
 25 as true." *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977); *see* FED.R.CIV.P. 8(d).  
 26  
 27  
 28

1           The first *Eitel* factor weighs in favor of granting plaintiff's motion because plaintiff has no  
2 other recourse to recoup damages caused by defendant and prevent defendant from further  
3 infringement. *See Adobe Sys. Inc. v. Marmeleitos*, 2009 WL 1034143 at \*3 (N.D. Cal. Apr. 16, 2009).  
4 Defendant has not answered or otherwise responded to the complaint. If plaintiff's motion for default  
5 judgment is not granted, plaintiff "will likely be without other recourse for recovery." *PepsiCo, Inc.*  
6 *v. Cal. Security Cans*, 283 F.Supp.2d 1127, 1177 (C.D. Cal. 2002).

7           The second and third *Eitel* factors favor a default judgment where the claims are meritorious  
8 and the complaint sufficiently states a claim for relief. *See Cal. Security Cans*, 238 F.Supp.2d at  
9 1175; *Danning v. Lavine*, 572 F.2d 1386, 1388–89 (9th Cir. 1978)). Plaintiff's complaint states  
10 plausible claims for relief for multiple violations of the Lanham Act. (*See doc. # 1*). Further,  
11 plaintiff's complaint is well pleaded as it identifies defendant, enumerates plaintiff's rights in its  
12 trademarks, describes the steps defendant took to infringe upon its trademark, and sets forth causes  
13 of action for defendant's conduct. (*Doc. # 1*).

14           Under the fourth *Eitel* factor, the court considers the amount of money at stake in relation to  
15 the seriousness of defendant's conduct. *See Cal. Security Cans*, 238 F.Supp.2d at 1176. The sum of  
16 money sought is relatively large, over \$100,000; however, the relief sought is appropriate under the  
17 Anti-Cybersquatting Consumer Protection Act (ACPA). This factor weighs neither in favor nor  
18 against granting default judgment.

19           The fifth *Eitel* factor also favors default judgment. Given the sufficiency of the complaint,  
20 evidence of plaintiff's trademark registrations and defendant's infringement, and defendant's default,  
21 "no genuine dispute of material facts would preclude granting [plaintiff's] motion." *Cal. Security*  
22 *Cans*, 238 F.Supp.2d at 1177; *see Geddes*, 559 F.2d at 560.

23           Applying the sixth factor, the court cannot conclude that defendant's default is due to  
24 excusable neglect. Defendant was properly served with summons and the complaint. (*See doc. # 18*).  
25 Defendant's failure to respond or litigate this case cannot be attributable to excusable neglect. *United*  
26 *States v. High Country Broadcasting Co., Inc.*, 3 F.3d 1244, 1245 (9th Cir. 1993) (holding that it was  
27  
28

1 “perfectly appropriate” for the district court to enter default judgment against a corporation that  
2 failed to appear in the action through licensed counsel).

3 The final *Eitel* factor weighs against default judgment. “Cases should be decided upon their  
4 merits whenever reasonably possible.” *Eitel*, 782 F.2d at 1472. But the mere existence of Rule 55(b)  
5 “indicates that this preference, standing alone, is not dispositive.” *Cal. Security Cans*, 238 F.Supp.  
6 at 1177 (citation omitted). Moreover, defendant’s failure to answer or otherwise respond to the  
7 complaint “makes a decision on the merits impractical, if not impossible.” *Id.*

8 Having reviewed plaintiff’s motion and evidence previously submitted in this case, and  
9 having considered the *Eitel* factors as a whole, the court concludes that the entry of default judgment  
10 is appropriate against defendant. The court now turns to the reasonableness of the damages and relief  
11 sought in the default judgment.

## 12 **B. Damages and Injunctive Relief**

### 13 **1. Corrective Advertising**

14 Plaintiff seeks damages of \$1,000 as compensation for corrective advertising. In the Ninth  
15 Circuit, it is permissible for the court to award damages for prospective corrective advertising. *Adray*  
16 *v. Adry-Mart, Inc.*, 68 F.3d 362 (9th Cir. 1995), *amended*, 76 F.3d 984 (9th Cir. 1996). A plaintiff  
17 need not show a specific measure of harm to its goodwill and reputation in order to recover  
18 corrective damages. *Adray*, 76 F.3d at 988.

19 Plaintiff concedes the difficulty in ascertaining the damages plaintiff has suffered. (Doc. #  
20 21, 21:27-28). Provided that plaintiff seeks a nominal amount of \$1,000 in light of the uncertainty  
21 of the actual damages suffered by plaintiff, the court finds this amount appropriate.

### 22 **2. Statutory Damages**

23 Plaintiff also seeks damages in the amount of \$100,000 pursuant to 15 U.S.C. § 1117(d) for  
24 plaintiffs prevailing on ACPA claims. Courts may award statutory damages for cybersquatting:

25 In a case involving a violation of section 1125(d)(1) of this title, the plaintiff may  
26 elect, at any time before final judgment is rendered by the trial court, to recover,  
27 instead of actual damages and profits, an award of statutory damages in an amount  
28 of not less than \$1,000 and not more than \$100,000 per domain name, as the court  
considers just.

1 15 U.S.C. § 1117(d). “[T]he court has wide discretion in determining the amount of statutory  
2 damages to be awarded, constrained only by the specified maxima and minima.” *Harris v. Emus*  
3 *Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984). Plaintiff requests the court to send a clear  
4 message that misappropriating famous trademarks with the bad faith intent to profit will not be  
5 tolerated. (Doc. # 21, 15:12-15). Further plaintiff asserts that awarding the maximum statutory  
6 amount would deter defendant from its ongoing, unlawful conduct.

7 Plaintiff provides the court with an array of other courts in this district that have awarded  
8 statutory damages under ACPA with damages ranging from \$1,000 to \$1,100,000. While these cases  
9 are not binding on the court, they are informative on the matter. Provided that plaintiff also seeks a  
10 permanent injunction, the court finds that the maximum statutory award to effectuate deterrence  
11 unwarranted here. However, the court finds damages in the amount of \$10,000 appropriate.

### 12 3. Injunctive Relief

13 Plaintiff seeks a permanent injunction prohibiting defendant or its agents from engaging in  
14 further acts of trademark infringement and a permanent transfer of the domain name. (Doc. # 16:6-  
15 9). ACPA authorizes courts to transfer domain names to the owner of the mark. 15 U.S.C. §  
16 1125(d)(1)(C). “Injunctive relief is the remedy of choice for trademark and unfair competition cases,  
17 since there is no adequate remedy at law for the injury caused by defendants’ continuing  
18 infringement.” *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175 (9th Cir. 1988).

19 At the time plaintiff applied for injunctive relief, the domain name was registered to  
20 defendant; however, the court granted plaintiff’s motion for a preliminary injunction, transferring  
21 the domain name to plaintiff pending the outcome of this case. Based on evidence of defendant’s  
22 infringement, the court finds that permanent transfer of the domain name appropriate.

### 23 III. Conclusion

24 Accordingly,

25 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff Boyd Gaming  
26 Corporation’s motion for default judgment (doc. # 21) and request to release bond (doc. # 22), be,  
27 and the same hereby are, GRANTED.  
28

1 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff be awarded  
2 judgment against defendant as follows:

- 3 1. statutory damages in the amount of \$10,000;
- 4 2. damages for corrective advertising in the amount of \$1,000;
- 5 3. reasonable attorneys' fees;
- 6 4. costs; and
- 7 5. post-judgment interest on the principal sum at the statutory judgment rate from the entry of  
8 judgment until paid in full.

9 IT IS FURTHER ORDERED that defendant and its officers, agents, servants, employees  
10 and/or all persons acting in concert or participation with defendant are hereby permanently enjoined  
11 from:

- 12 1. using the trademark IP CASINO ("IP CASINO Mark") or confusingly similar variations  
13 thereof, alone or in combination with any other letters, words, letter strings, phrases or  
14 designs, in commerce or in connection with any business or for any purpose whatsoever  
15 (including, but not limited to, on websites, on domain names, in hidden text and metatags);  
16 and
- 17 2. registering or trafficking in any domain names containing the IP CASINO Mark or  
18 confusingly similar variations thereof, alone or in combination with any other letters, words,  
19 phrases or designs.

20 IT IS FURTHER ORDERED that registration of the domain name <ipcasino.com> shall be  
21 permanently transferred to plaintiff. The domain name registrar, Go Daddy, shall effectuate transfer.

22 IT IS FURTHER ORDERED that the clerk of the court shall refund plaintiff the \$100 bond  
23 by plaintiff as security for the temporary restraining order and preliminary injunction entered in this  
24 case.

25 DATED October 25, 2012.

26   
27 UNITED STATES DISTRICT JUDGE